CIRCUIT COURT OF LEE COUNTY.

ELBERT OLIVER v. LOUISVILLE & NASHVILLE RAILROAD CO.

Railroads—Failure to Fence—"Any Property" as Used in Code 1919, § 3949 Not Including Dogs.—The words "any property" in Code 1919, § 3949, relating to the liability of a railroad company for injury to any property on its track not enclosed according to the statutory requirement, contemplate only those species of animals which are valuable as food and most likely to be injured if allowed to stray upon a track, and do not include dogs which were made personal property by the express term of § 2324.

E. E. Skaggs, of Pennington Gap, for plaintiff.

Pennington & Pennington, of Pennington Gap, for defendant.

STATEMENT AND HOLDING.

This case was submitted to the court, without a jury, upon an agreed statement of facts. The facts agreed upon, in so far as pertinent, were as follows:

That the plaintiff was the owner of a certain valuable dog, and that the required taxes on said dog were paid; that said plaintiff lived closely adjacent to the track and right of way of the defendant; that, on the morning of July 3, 1921, said dog was found on the track of said defendant, not far from the home of the plaintiff, cut all to pieces; that it was admitted that said dog was killed by one of the trains of the defendant some time in the night; that at the point where the dog was found, and for a considerable distance in each direction from the spot, the fence of the defendant was in a bad state of repair; that this was at a point where it was the defendant's duty to maintain a lawful fence, as provided by statute; and that said fence was not a lawful fence.

There was no evidence of any negligence on the part of the defendant in the running of its trains, and the only ground of liability of the company was that the right of way was not fenced as required by section 3946 of the Code of 1919. The attorney for the plaintiff relied solely on the reading of section 3949 of the Code, which says: "In any action or suit against a railroad company for an injury to *any property* on any part of its track not enclosed according to the provisions of this chapter, *it shall not be necessary for the claimant to show that the injury was caused by the negligence of the company, its employees, agents, or servants.*" The decision of the question, therefore, hinged on whether or not the words "any property" included dogs; the attorney for the plaintiff further contending that dogs were made

personal property by express terms of the statute (section 2324 of the Code of 1919), and that to say the words "any property" did not include dogs would be against its very terms.

The attorney for the defendant contended that the words "any property" did not contemplate dogs, for dogs were a species of property and animals which a fence does not ordinarily restrain. Elliott on Railroads, section 1190; that the legislature, in defining a lawful fence in section 3538, declared that any fence "five feet high . . . . . shall be deemed a lawful fence as to any stock named in section 3541" (horses, mules, cattle, hogs, sheep and goats), and that by the maxim of construction, *expressio unius est exclusio alterius,* any other animal, or class of animals, were not contemplated in any section of the code where the words "lawful fence" were used. The attorney for the defendant argued further that section 3947 of the Code which says that section 3946, "so far as it relates to fencing, shall not apply to any part of a railroad . . . . . where there is a cut or embankment with sides sufficiently steep to prevent the passage of *stock* at such place;" . . . . . would raise an inconsistency, if the words "any property" were held to include any animals other than those named in section 3541; that the word "stock", by no fair construction could include any animal other than those named in section 3541; that it would be an absurdity to hold the defendant to the duty of fencing against dogs on a level stretch of right of way, and only against "stock" where there was a cut or embankment sufficiently steep to prevent the passage of stock. The conclusion reached by the attorney for the defendant was that the words "any property" in section 3949, when read in connection with the other sections herein cited, could only contemplate those species of animals which man valued as food, as subject to restraint, and most likely to be injured if allowed to stray upon a railroad track.

The position of the defendant company was upheld by the judge, who, by way of *dicta,* went even further and declared that the words "any property" did not refer to fowls.